No. 87-354

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1987

THE STATE OF ARIZONA,
Petitioner,

v.

RONALD WILLIAM ROBERSON,
Respondent.

On Writ of Certiorari to the
Supreme Court of Arizona

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Bruce M. Ferg, Arizona Assistant Attorney General, Counsel for the Petitioner, and Robert L. Barrasso, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* eighty-one times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 67 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in

America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

Amici are national and state associations, and their perspective is broad. This brief concentrates on policy issues concerning the waiver of rights by persons subject to law enforcement interrogation, and the need to give law enforcement agencies clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these. We speak on behalf of law enforcement officers and administrators nationally.

ARGUMENT

THE RULE OF *EDWARDS V. ARIZONA*, THAT POLICE OFFICERS MAY NOT INITIATE INTERROGATION OF AN IN-CUSTODY SUSPECT AFTER INVOCATION OF RIGHT TO COUNSEL, IS NOT APPLICABLE TO A CASE IN WHICH THE SUSPECT, HAVING INVOKED HIS RIGHTS IN REGARD TO A CRIME THEN UNDER INVESTIGATION, LATER CONSENTS TO QUESTIONING ABOUT AN UNRELATED CRIME, CONDUCTED BY OTHER OFFICERS WHO ARE IGNORANT OF THE PRIOR INVOCATION OF RIGHTS AND WHO COMPLY COMPLETELY WITH THE REQUIREMENTS OF *MIRANDA V. ARIZONA*.

In this case the Arizona Court of Appeals, Division Two, in an unpublished opinion, *State v. Roberson*, 2 CA-CR 4474-5 (Az. Ct. App., Mar. 19, 1987), held that a coercive environment surrounded the Respondent (hereinafter called the "defendant"), who was continuously in police custody from the time of asserting his Fifth Amendment right to counsel through the time he was questioned outside an attorney's presence on a crime other than the one for which he was originally taken into custody, that such environment never dissipated, and, therefore, even though the defendant did not request an attorney after being advised of his rights prior to questioning on the second crime, the trial court properly suppressed his statements.

The case squarely raises the question of whether the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), that police officers may not initiate interrogation of an in-custody suspect after invocation of his right to counsel, is applicable to a case in which the suspect, having invoked his rights in regard to a crime then under investigation, later consents to questioning about an unrelated crime,

conducted by other officers who are ignorant of the prior invocation of rights and who comply completely with the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966).

Amici will not duplicate the case law analysis presented by the Petitioner in this case; instead, we concentrate upon issues of policy that concern our law enforcement constituency.

The position urged by defendant lacks support from the rule established in *Edwards v. Arizona*. In that case the second attempt of the police to question Edwards was for the *same offense* for which he had earlier invoked his rights under *Miranda v. Arizona*. In the instant case the police questioning that is in dispute concerned a crime *totally unrelated* to the one for which he had claimed his right to counsel. The legitimacy of the latter questioning, regarding which the suspect had received and waived his *Miranda* rights, is supported by sound reasons and prior authority of this Court.

In *Edwards*, the defendant, while a suspect in a robbery-murder, had been taken into custody and given the *Miranda* warnings. His initial response was that he understood his rights and was willing to submit to police questioning. However, after being told that another arrestee had implicated him, Edwards denied involvement, and gave a taped statement in which he presented an alibi. He then sought to "make a deal." When told that his questioner was unable to deal, Edwards stated that he wanted an attorney, at which point the interrogation ceased. The next morning two other detectives, colleagues of the original questioners, sought to question Edwards. They, too, informed him of his rights and he stated his willingness to talk, but that he first wanted to hear the tape recorded statement of the alleged accomplice. After hearing part of the tape, Edwards said that he would make a statement provided

it would not be taped. Then, when told that a recording was not necessary, he confessed. Upon trial he was convicted, and his conviction was affirmed by the Arizona Supreme Court, which held that he had waived both of his *Miranda* rights. In reversing that ruling, this Court held that in order for a waiver to be valid, Edwards must have *initiated* the statements he ultimately gave the police, a factor the Court found to be lacking. Three Justices concurred in the result only, with two of them objecting to what they considered "an undue, and undefined emphasis on a single element: 'initiation'." 451 U.S. at 492.

Irrespective of whatever consideration may be accorded the reasoning of the Court in *Edwards,* it does stand for the proposition that the waiver of rights claimed under *Miranda* must be initiated by the suspect. One fact that is clear, however, is that the *Edwards* case involved an interrogation *about the same offense regarding which the suspect had earlier asserted his Miranda rights.*

The basic issue in the instant case was resolved, we submit, by this Court's decision in *Michigan v. Mosley,* 423 U.S. 96 (1975). In *Mosley,* a police detective in the Detroit Police Department's robbery detail arrested the defendant as a robbery suspect. After he received *Miranda* warnings the arrestee stated that he did not want to talk. No interrogation was attempted. More than two hours later, however, another detective from the Detroit homicide unit wanted to question Mosley regarding an unrelated murder. This time, following a second issuance of the warnings, Mosley waived his rights. At first he denied any involvement, but upon being told that an alleged accomplice had named him as the killer, Mosley confessed. A majority of this Court, with two Justices in dissent, ruled that there was no *Miranda* violation, and that the confession was properly

held admissible as evidence.

Although *Mosley* was a case in which the suspect had asserted his right to silence, and did not claim a right to counsel, the principle established in that case is equally applicable to the present one. As *amici* pointed out in their brief in another case now pending before this Court, *Patterson v. Illinois,* #86-7059, __ U.S. ___, 108 S. Ct. 227 (1987), there is, in the context of *Miranda,* no higher priority to be accorded a claim to counsel over a claim to remain silent. In fact, as we stated in that brief, one of the strongest supporters of *Miranda,* Professor Yale Kamisar, has considered such a professed distinction to be a "baffling" one. As he correctly pointed out, the Court's concern in *Miranda* was the protection of the Fifth Amendment's self-incrimination privilege, with only an auxiliary consideration accorded the right to counsel at a police interrogation. See, 34 Cr.L. 2101 (1983), a comment by Professor Kamisar during a "Syposium on Supreme Court Review and Constitutional Law."

In other words -- and contrary to a generally prevailing misconception, even within the legal profession itself -- the inclusion of the right to counsel as one of the *Miranda* warnings was *not* in deference to the Sixth Amendment right itself, but only to bolster the self-incrimination privilege. Both rights are equally subject to a suspect's waiver.

There are sound reasons in support of the position that the police should not be foreclosed from investigating, by means of lawful interrogation procedures, crimes unrelated to the one for which a suspect has invoked his rights under *Miranda*. This view was succinctly and cogently expressed by Justice Potter Stewart when he stated, in *Michigan v. Mosley,* 423 U.S. at 103, that "a blanket prohibition against the taking of

voluntary statements or a permanent immunity from further interrogation would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity."

Attempts to extend *Miranda* beyond its already intolerable limits never cease to end. One recent illustration is the effort, fortunately a futile one, that was made to persuade this Court in *Colorado v. Spring*, __ U.S. __, 107 S. Ct. 851 (1987), that a waiver of *Miranda* rights was invalid unless the suspect was informed of all the crimes about which he might be questioned. With only two dissents, this Court rejected that contention. As some of the *amici* in the present case pointed out in their brief in *Spring*, an acceptance by this Court of the rule the Colorado appellate courts had adopted would have imposed unconscionably absurd practical difficulties upon the essential police interrogation process.

Another recent illustration of proposed absurdities of *Miranda* extensions is the case of *Connecticut v. Barrett*, __ U.S. __, 107 S. Ct. 828 (1987), in which this Court was urged, unsuccessfully, to hold that a warned suspect's *oral* confession should be rejected because he subsequently refused to sign a *written* one without counsel being present. The Court made clear that the rule in *Edwards*, as is true of *Miranda* itself, is *not* constitutionally required, but is merely a rule adopted to avoid coercion prohibited by the Fifth Amendment. The Court approved, in effect, the concept of selective invocation of rights by defendants in police custody, as took place in the instant case.

> To this end, the *Miranda* Court adopted prophylactic rules designed to insulate the exercise of Fifth Amendment rights from the government "compulsion, subtle or otherwise," that "operates on the individual to

> overcome free choice in producing a statement after the privilege has been once invoked." *Miranda, supra,* 384 U.S., at 474, 86 S. Ct., at 1627. See also *Smith,* 469 U.S., at 98, 105 S. Ct., at 4943; *Oregon v. Bradshaw,* 462 U.S. 1039, 1044, 103 S. Ct. 2830, 2834, 77 L. Ed. 2d 405 (1983). One such rule requires that, once the accused "states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda,* 384 U.S., at 474, 86 S. Ct., at 1627. See also *Edwards,* 451 U.S., at 484, 101 S. Ct., at 1884. *It remains clear, however, that this prohibition on further questioning--like other aspects of* Miranda--*is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose.* (emphasis added). 107 S. Ct. at 832.

Mention may also be made of what was sought in the 1986 case of *Moran v. Burbine*, __ U.S. __, 106 S. Ct. 1135, 1141-1142 (1986), in which Justice Sandra O'Connor, speaking for the majority of the Court, said in response to the argument of defense counsel, "[e]vents occurring outside the presence of the suspect and entirely unknown to him can have no bearing on the capacity to comprehend and knowingly relinquish a constitutional right," to which the Justice added, "... we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self interest in deciding whether to speak or stand by his rights."

We urge that the Court not impose upon law enforcement the roadblock defendant seeks to establish. We also respectfully suggest that in its opinion the Court give some indication that with regard to future proposed

extensions of *Miranda's* coverage, "enough is enough." This may discourage further erosions upon the Court's valuable time until, hopefully, it may decide to completely dispense with the unwarranted aspects of the *Miranda* mandate itself.

CONCLUSION

Amici submit that the judgment of the court below should be reversed on the basis of the law and sound judicial policy.

Respectfully submitted,

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